

Bill Memo

SB 344 – Enact the Montana Property Fairness Act

Sponsor: Sen. Jason Priest

Hearing:

Senate Judiciary, Friday, Feb. 18, 8 am, Rm 303

Bill Purpose:

The primary purpose of this proposal is to enact a private property protection statute that defines when private property is “taken or damaged” for public use and provides remedies for same. Under this statute, an action of a governmental entity that results in the diminution in fair market value of private property—real and personal—by at least 10% gives rise to a cause of action for just compensation (except under certain circumstances). This type of taking or damaging of private property is commonly referred to as a “regulatory taking.”

The people of Montana need a regulatory takings bill because the Montana government increasingly relies on regulations that consume private property for public benefit, and does so without the procedural and financial requirements of formal eminent domain proceedings. Recent examples include county critical area ordinances; county streamside setbacks regulations; the Department of Livestock’s order regarding designated surveillance areas (DSA) for brucellosis; Initiative 143 (prohibiting alternative livestock farms from transferring their licenses or allowing shooting of game for a fee); and Initiative 161 (abolishing guaranteed outfitter-sponsored licenses for big game hunting).

The government’s use of regulations that take or damage private property without paying just compensation violates at least two provisions of Montana’s Constitution. Article II, Section 3 provides that all persons are born free with certain inalienable rights, including the right of “acquiring, possessing and protecting property.” Article II, Section 29 provides that private property “shall not be taken or damaged” for public use without just compensation having been first made to the owner. Moreover, such actions often violate the broad protection of the people’s liberty interests and inalienable rights in property found in Sections 70-1-101 and -104 of the Montana Code.

Nonetheless, in 2008, the Montana Supreme Court rendered these constitutional and statutory provisions meaningless in the context of one type of governmental regulatory action. The court denied the takings claims of ranchers whose state-licensed businesses were obliterated by a voter initiative, holding that the businesses and their associated intangible assets and real estate fixtures did not constitute compensable property rights. The court gave no effect to the word “damaging” in Article II, Section 29; ignored Article II, Section 3; and ignored Sections 70-1-101 and -104, instead relying on federal law—despite the fact that Montana law is expressly more protective of private property.

Several justices of the court vehemently dissented. Their arguments form the conceptual basis for SB 344, as well as for SB 347, a complementary bill to amend the Private Property Assessment Act, Section 2-10-101 et seq., MCA. The dissenting justices explicitly invited the legislature “to enact laws to protect constitutional rights when this Court refuses to define and enforce those rights.” Indeed, the legislature, not the judiciary, is the proper branch of government to define property and establish policies and principles relating to property within the context of state constitutional provisions. The legislature must not be silent in the aftermath of the court’s decisions, or else those decisions will be deemed to express background principles of law relevant to private property.

SB 344 is the product of careful consideration of different approaches to a regulatory takings statute. It provides a balanced, comprehensive solution that seeks to protect private property rights and create tangible solutions for both government and property owners, while minimizing frivolous claims and allowing government to regulate without having to compensate property owners when it is appropriate to do so.

Analysis by Section

WHEREAS, Article II, section 3, of the Montana Constitution provides that all persons are born free with certain inalienable rights, including, in pertinent part, the right of "acquiring, possessing and protecting property"; and

WHEREAS, Article II, section 29, of the Montana Constitution provides, in pertinent part, that private property "shall not be taken or damaged" for public use without just compensation having been first made to the owner; and

WHEREAS, the Legislature determines that government increasingly relies on regulations that consume private property; and

WHEREAS, the Montana Legislature is the proper branch of government to define property and establish policies and principles relating to property within the context of these state constitutional provisions and has jealously guarded the people's liberty interests and inalienable rights in property by broadly defining property in section 70-1-104, MCA; and

WHEREAS, the Legislature does not consent to the majority decisions of the sharply divided Montana Supreme Court in the cases of *Kafka v. Montana Department of Fish, Wildlife & Parks*, 348 Mont. 80, 201 P.3d 8 (2008), and *Buhmann v. State of Montana*, 348 Mont. 205, 201 P.3d 70 (2008), because those decisions failed to give effect to or eviscerated the foregoing provisions of Montana's Constitution and statutes; and

WHEREAS, the Legislature determines that those Montana Supreme Court decisions have needlessly and recklessly limited the people's vested rights and interests in private property and intends that those decisions may not define the state's policies with respect to private property nor express background principles of law relevant to private property, and therefore intends to reaffirm the plain language of the foregoing provisions of Montana's Constitution and statutes; and

WHEREAS, the Legislature finds it necessary to enact a private property protection statute that defines when private property is taken or damaged for public use and provides remedies for the same, pursuant to which an action of a governmental entity that results in the diminution in fair market value of private property by at least 10% gives rise to a cause of action for just compensation, except under certain circumstances prescribed by law.

Rationale:

This amendment expressly describes the purpose and necessity of a new regulatory takings statute, making clear why Montana Supreme Court decisions not only cannot be relied upon to protect against uncompensated regulatory takings, but also how they have eviscerated constitutionally and statutorily protected private property rights.

NEW SECTION. Section 1. Short title. [Sections 1 through 11] may be cited as the "Montana Property Fairness Act".

Rationale:

The proposed name of the statute conveys its balanced approach. The 2009 initiative was called the "Private Property Rights Preservation Act."

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 11], unless the context requires otherwise, the following definitions apply:

(1) "Action of a governmental entity" means an enforceable administrative, regulatory, or legislative action of a governmental entity, including any statute, law, rule, ordinance, resolution, guideline, policy, action on an application or permit, or similar measure, and whether enacted by a legislative body, citizen initiative, or referendum.

Rationale:

This amendment takes a broad view of the kinds of governmental actions that are subject to the statute. We believe the word "enforceable" is critical because some governmental actions, such as proposals or guidelines, have no concrete effect unless and until they have indicia of enforceability or are implemented by an agency. We also believe it is important to include actions taken through the vehicle of citizen initiatives and referenda.

Examples of the range of governmental actions to which this statute would possibly apply include county critical area ordinances; county streamside setbacks regulations; the Department of Livestock's order regarding designated surveillance areas (DSA) for brucellosis; and initiatives akin to I-143 and I-161.

(2) "Claim" means a written demand for compensation filed in accordance with [sections 1 through 11].

(3) "Enacted" means to enact, adopt, or amend.

(4) "Fair market value" means the price estimated in terms of money of private property that a willing buyer would pay a willing seller after considering all factors in the marketplace that influence the price of private property, including the highest and best use of the property.

Rationale:

This amendment invokes a common and reliable measure used by real estate appraisers and courts to appraise the value of property.

(5) "Governmental entity" has the meaning as defined in 2-9-101.

Rationale:

This amendment takes a broad view of the kinds of governmental actors that are subject to the statute; it includes state, local and municipal agencies.

(6) "Just compensation" means for purposes of an action for taking or damaging property, the remuneration equal to the amount the fair market value of all or a portion of the affected property has been decreased by the application or enforcement of the action of a governmental entity, determined by comparing the fair market value of the portion or whole of the affected property as if the governmental action is not in effect and as if the governmental action is in effect.

Rationale:

This amendment invokes the language of Article II, Section 29 of the Montana Constitution as well as a common and reliable valuation methodology used by real estate appraisers and courts regarding the value of property.

(7) "Owner" means the holder of legal or equitable title to private real property at the time a governmental entity enacts or enforces an action affecting that property, and as further defined under Montana statutory and common law. The term does not include a governmental entity for purposes of [sections 1 through 11].

(8) "Private property" means:

(a) any real property interest protected under the 5th and 14th amendments to the United States constitution and Article II, sections 3, 4, 17, and 29, of the Montana constitution; or

(b) any personal property pursuant to 70-1-104.

Rationale:

This amendment takes a broad, but supportable and logical, view of the definition of "private property." First, it incorporates Montana's constitutional provisions that protect private property. Second, it incorporates Montana statutory law that treats many categories of personal and intangible property as property rights, instead of mere privileges. In the "elk farm" cases, the Montana Supreme Court majority did not apply that statutory law, although the court did acknowledge that under certain circumstances, licenses and intangible assets could be compensable property rights. This amendment seeks to give effect to the intent of 70-1-104 and the dissenting opinions in the elk farm cases.

NEW SECTION. Section 3. Taking or damaging -- diminution in value -- action for just compensation -- waiver in lieu of compensation -- exemptions -- question of fact for jury -- waiver of governmental entity immunity. (1) Except as provided in subsection (3), if the existing rights to possess, use, modify, develop, sell, or otherwise freely transfer property are affected by any action of a governmental entity and that action results in taking or damaging the property by diminishing its fair market value by at least 10%, the owner of the property is entitled to just compensation from the governmental entity responsible for the action.

Rationale:

This amendment establishes the circumstances under which an affected property owner has the right to sue a governmental entity for just compensation, giving effect to the "damage" language in Article II, Section 29 of the Montana Constitution and providing a definitive measuring stick for regulatory takings. The several states to enact similar statutes have used a diminution percentage ranging from zero percent to 25 percent, or have used an "inordinate burden" standard instead of a percentage. After careful consideration of all options, we believe 10 percent is the most fair and reasonable standard.

(2) This section does not limit a governmental entity's ability to waive or issue variances from that governmental entity's action as applied to affected property. A governmental entity that chooses not to take action that would result in taking or damaging private property is not liable for paying compensation under [sections 1 through 11].

Rationale:

This amendment establishes that a governmental entity has the option to waive an action or issue a variance so that the action will not impact a particular property, thereby avoiding liability for just compensation.

(3) The following governmental entity actions are exempt from the requirements of subsection (1):

(a) actions of a governmental entity that:

- (i) were enacted before [the effective date of this act];
- (ii) limit or prohibit the use of real property previously recognized as a private or public nuisance;
- (iii) are required by federal law;

Rationale:

This amendment sets forth a list of exemptions commonly found in regulatory takings statutes and established under Montana property law jurisprudence. The list is carefully tailored and does not mirror the overly expansive, rule-swallowing list of exceptions found in Texas's statute, but also is more protective of valid government actions than the bare bones lists found in other states. Further explanation is provided below as necessary.

(iv) limit the location or operation of property for the purpose of housing sex offenders, selling illegal drugs, selling medical marijuana, or liquor control or property associated with pornography, obscenity, nude or topless dancing, or other adult-oriented businesses;

Rationale:

This exemption includes “selling medical marijuana” to ensure that the government still has power to regulate the sale of medical marijuana as it deems appropriate without subjecting itself to a regulatory takings lawsuit.

- (v) establish locations for utility facilities;
- (vi) are taken in response to a real and substantial threat to public health and safety and that:
 - (A) can be verified to address the real and substantial threat; and
 - (B) do not impose a greater burden than is necessary to address the real and substantial threat;

Rationale:

This exemption is drafted narrowly as to prevent governmental entities from using it improperly or too easily, given its discretionary aspects.

- (b) a governmental entity's formal exercise of eminent domain against only real property;

Rationale:

This exemption includes the language “against only real property” to ensure that governmental entities do not try to end-run this statute by converting what are really regulatory actions into formal eminent domain proceedings.

- (c) a proposed seizure of property by law enforcement officials as evidence or under a state forfeiture statute or a proposed forfeiture of property during or as a result of criminal proceedings; or
- (d) the repeal of an action of a governmental entity.
- (4) The governmental entity responsible for the action has the burden of demonstrating that the action is exempt pursuant to the provisions of subsection (3).
- (5) If an action of a governmental entity continues to apply to private property more than 180 days after the governmental entity receives a written claim in a specific amount for just compensation as provided in [section 4], the owner has a cause of action for just compensation in a court in the county in which the property is located unless the owner accepts a settlement offer by the governmental entity.

Rationale:

This amendment provides that, for a property owner to pursue a cause of action for just compensation after the 180-day final determination period (discussed in Section 4) has expired, the governmental entity action must still be applicable to the property.

- (6) A governmental entity may not charge any fee for considering whether to waive or grant a variance from an action pursuant to subsection (2) in order to avoid responsibility for paying compensation as provided in [sections 1 through 11].
- (7) A demand for property owner relief or any waiver that is granted in lieu of compensation runs with the land.

Rationale:

Transferability of any claim or granted waiver is a critical component of the statute. Transferability creates predictability for the property owner and the governmental entity alike, and avoids repetitive claims and lawsuits, in that a governmental entity need not revisit the same claim when ownership of property transfers, and a property owner need not have the value of its property upon a prospective sale encumbered by a governmental action when it has already received a waiver.

(8) Whether a governmental action results in a taking or damaging of private property is a question of fact to be determined by a jury or, upon agreement of the parties, by the court sitting without a jury.

(9) Governmental entity immunity from suit and liability is waived and abolished to the extent of the liability created by [sections 1 through 11].

NEW SECTION. Section 4. Procedure for processing final determination period. (1) (a) Within 180 days from the date of an action of a governmental entity or entities, a property owner that seeks compensation under [sections 1 through 11] shall present the governmental entity or entities that have taken the action with written notification, by first-class mail or personal delivery, describing the claim.

(b) To be complete, a claim under this section must include:

- (i) the name, address, and other contact information of each claimant;
- (ii) the address, if any, and tax lot number, township, range, and section of the affected property;
- (iii) evidence of the date of acquisition by the claimant, including the instrument conveying the property to the claimant and a report from a title company identifying the person in which title is vested and the acquisition date and describing exceptions and encumbrances to the title that are of record;
- (iv) a reference to the governmental entity action by paragraph, section, or any other description so that the action is clearly identified;
- (v) a description of the specific use of the property that the claimant desires to carry out but cannot, in whole or in part, because of the governmental entity action; and
- (vi) a valid appraisal of the property that supports the claim and demonstrates a taking or damaging of the property in terms of the diminution in fair market value to all or a portion of the property of at least 10%.

(c) If a claim is incomplete, the governmental entity shall notify the claimant in writing of the information that is missing within 30 days after the date of receipt of the claim by first-class mail or personal delivery and allow the claimant to submit the missing information. If the governmental entity does not notify the claimant that information is missing within 30 days after the claim is received, the claim is considered to be complete on the date of receipt. If notice was provided within 30 days, the claim becomes complete when the governmental entity receives:

- (i) the missing information;
- (ii) part of the missing information and written notification from the claimant that the remainder of the missing information will not be provided; or
- (iii) written notification from the claimant that none of the missing information will be provided.

(d) The governmental entity shall issue a final determination within 180 days after the date a claim is complete. The final determination may include but is not limited to any of the following:

- (i) an agreement to pay compensation equal to the diminution in fair market value of the property caused by the governmental action;
- (ii) an issuance of a waiver, development order, variance, special exception, or other extraordinary relief;
- (iii) an offer to purchase the real property or an interest in real property by the appropriate governmental entity, including the price and other material terms and conditions of the offer to purchase;
- (iv) an adjustment of land development or permit standards or other provisions controlling the development or use of land;
- (v) modifications in the density, intensity, or use of areas of development;
- (vi) the transfer of developmental or use rights;
- (vii) an offer of land swaps or exchanges;
- (viii) mitigation, including payments in lieu of onsite mitigation;
- (ix) a change in location to the least sensitive portion of the property;
- (x) conditioning the amount of development or use permitted; or
- (xi) no changes to the action of the governmental entity.

(e) The governmental entity shall mail a copy of the final determination to the claimant and to any person who submitted written evidence or oral testimony before the close of the record. The governmental entity

shall forward to the county, and the county shall record, a memorandum of the final determination in the deed records of the county in which the property is located.

(f) The governmental entity shall make the entire record on review of a claim, including any staff reports and written comments, available to the public for inspection at the office of the governmental entity during regular business hours throughout the final determination period and for 5 years after the final determination period.

(2) At the expiration of the 180-day final determination period or after receiving the governmental entity's final determination, the claimant may either accept the governmental entity's final determination or proceed to file a claim for just compensation in a court in the county where the property is located. A copy of any pleading by the claimant must be served on each of the governmental entities that made a settlement offer that was rejected by the claimant.

(3) If the governmental entity and claimant enter into an agreement that has the effect of contravening the application of a governmental action to the subject property, the governmental entity and the claimant shall jointly file a petition in a court in the county where the property is located for approval of the agreement by the court in order to ensure that the relief granted protects the public interest served by the action at issue and is the appropriate relief necessary to prevent the governmental entity's regulatory effort from taking or damaging the property.

(4) A governmental entity may not require a claimant to first submit an application to remove, modify, vary, or otherwise alter the applicability of the action of a governmental entity to the owner's property as a prerequisite to bringing a claim for or receiving just compensation.

(5) This section does not prohibit methods agreed to by the parties and lawfully available for arbitration, mediation, or other forms of alternative dispute resolution, and governmental entities are encouraged to utilize those methods to augment or facilitate the processes and actions provided for in this section.

Rationale:

This section intends to provide comprehensive, yet not overly cumbersome claims filing and final determination procedures to ensure: that a claim contains all information necessary to allow the governmental entity to evaluate its merits; that a claim is supported by a valid appraisal; that claims are processed in a timely manner; that the public, such as other affected property owners, are able to participate in the final determination process; that settlement and alternative dispute resolution options are on the table; that there is judicial oversight of settlements involving waivers; and that claimants have the ultimate say in whether to accept the governmental entity's final determination offer or proceed to file a lawsuit for just compensation.

NEW SECTION. Section 5. Public notice of claims -- evidence and argument -- record on review. (1) (a) A governmental entity that receives a complete claim pursuant to [section 4] shall provide notice of the claim pursuant to subsection (2) of this section at least 30 days before a public hearing on the claim or, if there will not be a public hearing, at least 30 days before the deadline for submission of written comments. At a public hearing on a claim, the governmental entity shall give the public an opportunity to be heard regarding the claim.

(b) A public hearing or deadline for submission of written comments under this section must be set no later than 120 days after a complete claim is received by a governmental entity.

(2) (a) Notice provided under this section must be:

(i) mailed to all claimants and governmental entities identified in the claim at the addresses provided in the claim; and

(ii) published conspicuously once a week for 3 weeks in a newspaper of general circulation within the county where the property is located.

(b) The notice required under this section must sufficiently describe the claim and state:

(i) whether a public hearing will be held on the claim, the date, time, and location of the hearing, if any, and the final date for submission of written comments relating to the claim;

(ii) that the claim and any submitted written comments will be available for public inspection at the office of the governmental entity during regular business hours throughout the final determination period; and

(iii) that judicial review of the final determination of the governmental entity on the claim is limited to the written evidence submitted to the entity and is available only for issues that are raised with sufficient specificity to afford the governmental entity an opportunity to respond.

(3) Written comments on the claim must be submitted to the governmental entity not later than the close of the public hearing on the claim or, if a public hearing is not held, the date that is specified by the governmental entity in the notice required under this section.

(4) Within 30 days after a public hearing or the deadline for submission of written comments, the claimant may submit to the governmental entity additional written comments in response. The comments must identify the comments or arguments being addressed.

(5) After the public hearing or the deadline for submission of written comments, the governmental entity shall review the entire record, including any responsive comments received in a timely manner from the claimant, before issuing its final determination.

Rationale:

This section seeks to implement comprehensive notice and hearing procedures similar to that found in 76-2-205, MCA (Procedure for adoption of regulations and boundaries). The procedures ensure that the public, including other affected property owners, have the opportunity to bring comments/evidence regarding pending claims to the attention of the governmental entity, and that claimants have the opportunity to respond to the public's comments; and that the governmental entity considers all submitted comments before issuing a final determination.

NEW SECTION. Section 6. Statute of limitations. An action for just compensation based on diminution in value must be initiated within 3 years of the effective date of the action of a governmental entity or of the first date the diminution of the existing rights to use, divide, sell, or possess private property applies to the owner's parcel, whichever is later.

Rationale:

This statute of limitations is meant to be broad; for example, a property owner whose rights are not affected by a governmental action when it is enacted, but when it is applied to that property owner's property, does not lose his claim simply because the action was taken more than three years before that.

NEW SECTION. Section 7. Judicial review. Judicial review of a final determination under [sections 1 through 11] is limited to evidence in the record of the governmental entity at the time of its final determination and is available only for issues that are raised before the governmental entity with sufficient specificity to afford the governmental entity an opportunity to respond.

NEW SECTION. Section 8. Judgment, final decision, or order -- payment of compensation -- appeal. (1) A court may issue any order necessary to enforce the provisions of [sections 1 through 11] and to make final determinations to provide any relief available under [sections 1 through 11].

(2) (a) A judgment in favor of a property owner or a final decision or order issued pursuant to [sections 4 and 5] that determines that a taking or damaging has occurred must include the factfinder's determination of the monetary damages suffered by the property owner as a result of the taking or damaging.

(b) An award of compensation must include a reasonable award of prejudgment interest from the date the claim was presented to the governmental entity as provided in [section 4].

(3) The governmental entity shall pay to the property owner the damages as determined in the judgment or final order not later than 30 days after the date the judgment is rendered or the final decision or order is issued.

(4) As provided by law, a party may appeal a judgment that the action of the governmental entity has or has not resulted in a taking or damaging. An appeal does not automatically stay the proceedings; however, the court may stay the proceedings during the pendency of the appeal. If the governmental entity is the appellant, the court shall enjoin the entity from invoking the governmental action resulting in the taking or damaging during the pendency of the appeal.

Rationale:

This section allows for an interlocutory appeal by either party to a just compensation lawsuit; by doing so, it seeks to avoid the uncertainty about the availability of interlocutory appeals (some states that did not factor this into their regulatory taking statutes faced litigation on the issue and had to amend the statute or state appeals rules to address it).

NEW SECTION. Section 9. Fees and costs. (1) A property owner is not liable to any governmental entity for attorney fees or costs in any action for just compensation based on diminution in value brought pursuant to [sections 1 through 11].

(2) If a property owner prevails in an action for just compensation based on diminution of value and the court determines that a settlement offer of the governmental entity or entities did not constitute a bona fide offer to the property owner that reasonably would have resolved the claim, based upon the knowledge available to the governmental entity or entities and the property owner during the 180-day final determination period, the property owner may be awarded costs, expenses, and reasonable attorney fees from the governmental entity or entities, according to their proportionate shares, as determined by the court. This award may include costs and fees incurred defending any interlocutory appeal brought by the governmental entity or entities pursuant to this section.

Rationale:

This section uses a prevailing property owner attorney's fees model rather than the problematic "loser pays" model. Other states' experience with a loser pays model shows that it deters property owners from bringing valid claims. A prevailing property owner model causes governmental entities to be more cautious about taking actions that would take or damage private property, and more inclined to consider offering reasonable settlement options to a claimant rather than defending a lawsuit in court. The "bona fide offer" standard protects governmental entities from having to pay attorney's fees where a claimant acts unreasonably in not accepting an offer that reasonably would have resolved the claim.

NEW SECTION. Section 10. Statutory construction. The provisions of [sections 1 through 11] are to be liberally construed to effectuate the intent, policies, and purpose of [sections 1 through 11] to protect private property owners.

NEW SECTION. Section 11. Causes of action cumulative. (1) A cause of action created by [sections 1 through 11] is cumulative to the eminent domain provisions of Title 70, chapter 30, and any other remedy provided by the laws and constitution of Montana or the United States.

(2) [Sections 1 through 11] may not be construed as limiting any other laws or remedies protecting private property rights.

(3) In the event of a conflict, the law providing the greatest protection of private property rights must prevail.

Rationale:

It is important to indicate that this statute is cumulative to eminent domain law so that the statute is not interpreted under jurisprudence applicable to eminent domain, especially because the Montana Supreme Court has failed to apply and interpret the "taking or damaging" language in Article II, section 29 of the Montana Constitution without reference to traditional eminent domain concepts.

NEW SECTION. Section 12. Unfunded mandate laws superseded. The provisions of [this act] expressly supersede and modify the requirements of 1-2-112 through 1-2-116.

NEW SECTION. Section 13. Codification instruction. [Sections 1 through 11] are intended to be codified as an integral part of Title 70, and the provisions of Title 70 apply to [sections 1 through 11].

NEW SECTION. Section 14. Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. Section 15. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 16. Effective date. [This act] is effective July 1, 2011.

NEW SECTION. Section 17. Applicability. [This act] applies to governmental entity actions taken on or after [the effective date of this act].

Rationale:

This section provides for prospective applicability, because regulatory takings statutes in other states that applied retroactively resulted in too many claims and an excessive potential fiscal impact.